# STATE OF MICHIGAN

# COURT OF APPEALS

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ANTHONY SISTY,

Plaintiff-Appellant,

v

SORENSON PAPERBOARD CORPORATION,

Defendant-Appellee,

and

BLACK CLAWSON,

Defendant.

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UNPUBLISHED
February 9, 2006

No. 255220
Lenawee Circuit Court
LC No. 02-000994-NO

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting Sorenson Paperboard Corporation's (SPC) motion for summary disposition pursuant to MCR 2.116(C)(10). Because plaintiff cannot meet the extremely high threshold of proving an intentional tort, we affirm the decision of the trial court.

Plaintiff brought suit against defendant, his employer, after he suffered serious injuries when he fell into a machine while at work. The machine, called a "Black Clawson TD-10 winder," had injured another individual approximately eleven years earlier, but the machine had received some safety updates since the first accident. At the time plaintiff sustained his injuries, the winder machine was equipped with a safety guard and an interlock system limiting switch (switch), which essentially prevented the winder machine from operating if the safety guard was not in place. When plaintiff was trained to use the machine, he was instructed to run the machine with the guard down at all times. However, defendant's employees did not always operate the machine with the guard down because they could complete their work more quickly and efficiently with it up. Defendant was aware that its employees did not always run the machine with the guard down and frequently admonished its employees to operate the machine with the guard down. Defendant's employees were able to run the machine without the guard down because someone had disabled the switch by taping it down. Defendant's production supervisor was aware that the switch did not work and that the machine could be operated without the guard

down, however he warned employees that using the machine in such a manner would lead to discipline and even immediate discharge.

The trial court granted defendant's motion for summary disposition. On appeal, plaintiff claims that summary disposition was improperly granted because plaintiff presented evidence to show that SPC acted in an intentional manner, and thus, the intentional tort exception of the Worker's Disability Compensation Act (WDCA) has been met.

This Court reviews de novo a claim that the trial court improperly granted summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 260 Mich App 607, 612; 680 NW2d 423 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). The issue whether the facts alleged by a plaintiff are sufficient to constitute an intentional tort is a question of law for the court, while the issue as to whether the facts are as plaintiff alleges is a jury question. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 161; 551 NW2d 132 (1996).

Under the WDCA, the right to the recovery of benefits under the act is the employee's exclusive remedy against the employer for a personal injury, unless the injury arose from an intentional tort. *Travis*, *supra* at 161; MCL 418.131(1). An intentional tort exists only when an employee is injured as the result of a deliberate act of the employer and the employer specifically intended an injury. *Id*.; MCL 418.131(1). An employer is deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge. *Id*.; MCL 418.131(1). Here, plaintiff argues that SPC committed an intentional tort under MCL 418.131(1). Plaintiff specifically alleges that SPC committed a deliberate act and specifically intended to injure plaintiff because SPC had "actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."

Prior case law in this area warns that in order to satisfy the threshold, the plaintiff must prove that the employer committed a deliberate act and specifically intended that the act would injure an employee. Considering the evidence in the light most favorable to the plaintiff, we are not able to find any evidence that the employer committed a deliberate act or that such an act would knowingly lead to an employee's injury. While the plaintiff has demonstrated that the employer may have been negligent in not taking immediate remedial action regarding the improper use of the guard, there is no evidence of an intentional act on the part of the employer. Proof of negligence is insufficient.

The fact that consequences were substantially certain to occur is also insufficient to establish intent under the intentional tort exception to the WDCA. *Travis*, *supra* at 171; MCL 418.131(1). An employer's knowledge of general risks is insufficient to establish an intentional tort. *Herman v Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004). A corporate employer

had actual knowledge that an injury was certain to occur only through actual knowledge of a supervisory or managerial employee that an injury would follow from what the employer deliberately did or did not do. *Travis*, *supra* at 173-174. Constructive, implied, or imputed knowledge is insufficient; nor is liability imposed when an employer should have known or had reason to believe that injury was certain to occur. *Id*. An injury is "certain to occur" when there is no doubt regarding whether it will occur. *Id*. at 178. The requisite certainty is established if an employer subjects an employee to a continuously operative dangerous condition which it knows will cause an injury and yet refrains from informing the employee about the dangerous condition so that the employee is unable to take steps to keep from being injured. *Id*. Furthermore, conclusory statements by expert witnesses are insufficient to establish the requisite certainty. *Id*. at 174. Finally, an employer "willfully disregards" knowledge of the certainty of injury when it disregards actual knowledge that an injury is certain to occur; the employer's act or omission must be more than mere negligence. *Id*. at 178-179.

Plaintiff alleges that SPC had "actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge." Plaintiff alleges the "Black Clawson TD-10 winder" (machine), with its troubled guard and altered interlock system limiting switch, constituted a "continuously operative dangerous condition." SPC knew the machine would cause an injury, yet refrained from informing plaintiff about the dangerous condition of the machine. Thus, SPC put plaintiff in a situation where he was unable to take steps to keep from being injured. However, the machine does not constitute a "continuously operative dangerous condition." Though the machine injured Gilbert Perez in 1991, the injury was eleven years prior to plaintiff's injury and the machine has been changed since the Perez injury. After the Perez injury, SPC installed a guard on the machine and an interlock system limiting switch to prevent the machine from running if the guard was up. Since the machine is different from the machine that injured Perez and there have been no reported injuries on the altered machine in the last eleven years, it cannot be said that the machine was in a "continuously operative dangerous condition."

Furthermore, the fact that testimony establishes that SPC had knowledge that the limiting switch had been altered, and thus, was ineffective, *Travis*, *supra* at 173-174, does not make the machine a "continuously operative dangerous condition." The machine still had a guard, and though plaintiff stated that the guard was difficult to use, the guard was still functional. Plaintiff and SPC both stated that if the guard had been down, as instructed on numerous occasions, plaintiff would not have gotten hurt. Thus, since the machine would not have caused any injuries if it was operated as instructed, the fact that the limiting switch was inoperable does not make the machine a "continuously operative dangerous condition." *Travis*, *supra* at 178.

Alternatively, even if it were found that the machine was in a "continuously operative dangerous condition," plaintiff's argument would still fail because it has not been shown that SPC refrained from informing plaintiff about the condition so that he was unable to take steps to keep from being injured. Plaintiff was advised of the dangers of the machine. Plaintiff stated that he was aware of the dangers of the machine. Plaintiff was instructed on how to properly use the machine. Plaintiff was repeatedly told not to operate the machine with the guard up and plaintiff acknowledged that he was instructed on how to use the machine and was told on a couple of occasions to operate the machine with the guard down. Thus, even if it were found that the machine was in a "continuously operative dangerous condition" it could not be found that SPC had "actual knowledge that an injury was certain to occur and willfully disregarded that

knowledge." *Travis*, *supra* at 178-179. Therefore, plaintiff has not established an intentional tort exception to the WDCA, MCL 418.131(1), and thus, the trial court properly granted summary disposition. *Travis, supra* at 161.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis